

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 2599 OF 2004

The Director,
M/s. Phoenix Mills Limited,
462, Senapati Bapat Marg,
Lower Parel, Mumbai 400 013.

... Petitioner

Vs.

1. Chunilal Sudam Nishad,
residing at Room No. 55/41,
Chinai Building, Sunmill Road,
Lower Parel, Mumbai 400 013.

2. C.R. Hankare,
Presiding Officer,
4th Labour Court, Mumbai.

... Respondents.

Mr. T.R. Yadav i/by K.S. Bapat for Petitioner.

Mr.B.C. Shah for Respondents.

CORAM : F.I. REBELLO,J.
DATED : OCTOBER 20, 2004

ORAL JUDGMENT

. Rule. Heard forthwith.

2. The company challenges the judgement dated 4.12.2003 by which the application by the workmen/resopondent herein claiming benefits in terms of settlement dated 9.10.1997 has been allowed. The respondent workman had filed an application under Section 33C(2) of the Industrial Disputes Act. It was the case of the workman that there was a settlement entered into by the recognized union and the company. The respondent was working in the Texmaco Ring Department which

was closed pursuant to the settlement dated 9.10.1997. In the application, the respondent workman stated that negotiations had been entered into, which resulted into a settlement. The company had agreed for payment of 36 days of wages per year of service as retrenchment compensation and 15 days per year of service as gratuity to all the workmen of Texmaco Ring Department which consisted of 43 permanent workmen and 8 temporary workmen. The case of the Respondent workmen was that as such he was entitled to Rs.1,67,400 towards retrenchment compensation and Rs.69,750/- towards gratuity amount as the Applicant had put in 31 years of continuous service. The Respondent however, was paid only Rs.75,898.80 towards retrenchment compensation and Rs.56,924.10 towards gratuity on 22.9.1997. These facts were placed on record by letter of 2.12.1997.

. The Petitioner company filed their reply and contended that the application is liable to be rejected under Section 33C(2) of the Industrial Disputes Act as the respondent workmen did not satisfy the predicates of the said section. It is then pointed out that pursuant to the request made by the Union, it was agreed to pay the workmen involved ex gratia payment on their willingness to leave the services of the company. While calculating the ex gratia amount, no formula had

been adopted. Some of the employees were paid as mutually agreed between the company as well as the individual employee concerned. In some cases ex gratia was decided mutually by the company, employees and representatives of the union. While giving ex gratia amount, as no agreement had been entered into ex gratia amount differs in each and every case. As the workman here was paid and had collected the dues as per the understanding he cannot claim more than what was paid. It is pointed out that the Respondent was working in Texmaco Ring Department. Initially the workman was appointed as badli employee and thereafter made permanent. The respondent participated in an illegal strike and from 18th January, 1982 his services came to be terminated. Thereafter the workman approached the opponent for fresh employment and came to be engaged as fresh employee and thereafter he was in continuous employment till 12.8.1987. The contention of the Respondent workmen that representatives of R.M.M.S. had forcibly obtained signature on certain papers was denied.

2. In support of his case, respondent filed his evidence by way of examination in chief on affidavit. He has reiterated that the company agreed to pay 36 days wages per year of service as retrenchment compensation and 15 days per year of

service as gratuity. He has set out names of permanent workmen and temporary workmen who had been paid compensation at the rate of 36 days per year. It is also stated that the Union had taken signature on documents on 22.9.1997 before the settlement was signed. In cross examination he denied that in the meeting it was decided that 20 days per year compensation would be paid excluding 6 persons and at the time of receiving legal dues he had not disputed the calculations. He denied that there is no agreement about the rate of compensation of 36 days per year. He further denied that at the meeting it was agreed to give 20 days compensation per year of service.

. On behalf of the Petitioners, they examined Mr. Chandrakant Chavan. He admits that he was not party to the settlement. He states that the employees who failed to take part in the 1982 textile strike and few others were given 36 days salary per year of their service and the remaining were paid 20 days salary per year of their service. It is also set out that those who attained the age of 60 years were paid 50% of the salary till they attained the age of 63 years and that those who had attained the age of 62 years, were paid full salary till they attained the age of 63 years. He has admitted that the respondent joined as Badli and was made permanent on 12.12.1968. He has been paid

20 days salary per year of service. His years of service were taken as 29 years. He admits that the agreement was signed after making the payment. Receipt dated 22.9.1997 was prepared in his own handwriting. He then sets out that Gyandeo Tukaram, Shankar Appaji Jaiswal, Vilas R. Shelar and Satyawar Rangure were badli workers. These workers were paid compensation as per 36 days per year of service. Similarly he has given names of Damu Batwar, Bandu Bhosale, Chalu Santu, Shantaram Nikam and Ashok Walawalkar who were paid compensation at the rate of 36 days per year of service and they were permanent workers. Apart from that the said witness the company also examined Mr. Suresh More who was the organising secretary of the Rashtriya Mill Mazdoor Sangh. In his examination in chief, he sets out that all the permanent employees who have not completed the age of 60 years except 6 employees whose names have been shown in para 6, Page 4 of the said Agreement have been paid 20 days salary per completed year of their service and accordingly, the opponent mill has disbursed the agreed compensation and gratuity to all the concerned employees of the Texmaco and other departments as per the agreement dated 9th October, 1997. He also sets out that these 6 employees had not participated in the strike and worked continuously till September, 1997. It is his case that the employees including Respondent

accepted the agreed amount in his presence and it is only after disbursement that the agreement of 9.10.1997 was signed and subsequently registered.

In his cross examination this is what he has to say

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".... What was decided in the meeting was disclosed to all workers. The workers who were in service prior to 1983 were given the benefit of V.R.S. as per 36 days per year and 15 days gratuity and who came after May, 1983 they were given the benefit of 20 days V.R.S. and 15 days gratuity. Agreement dt. 9.10.1997 is shown to me. It is true that said fact is not mentioned in the agreement. I have signed said agreement, its contents are true. It is at Exh. U-16."

3. The learned Labour Court by Judgement of 4.12.2003 recorded a finding in Paragraph 21 that after the closure of other departments all the workers were paid compensation at the rate of 36 days per year of service as per the agreement Exh. U-10. The learned Judge found considering clause 10 of the settlement that if other employees after closure of Tax Meco Department, in terms of Clause 10 were paid at the rate of 36 days wages as also temporary workers were paid at that rate, there was

no reason why other workers like Respondents should not be entitled to the same. The learned Judge also in Para 20 recorded that nowhere in the written statement the Petitioner pleaded having adopted any formula for calculation of ex-gratia based on which the workman who did not take part in the said strike in 1983 were to be paid ex-gratia at different rate than other employees. The respondent had joined on 3.1.1967 and had been treated as continuous for payment of gratuity, in other words without break of service. Then he also ought to have been entitled to 36 days wages per year of service. Accordingly allowed the complaint.

4. At the hearing of this petition, on behalf of the petitioner, it is firstly contended that as the claim was not based on the settlement, as the settlement did not provide for payment of 36 days wages, the Court would have no jurisdiction to entertain the application. Reliance is placed on the judgement of the Apex Court in the case of Municipal Council Delhi Vs. Ganesh Razak and another (1995) 1 Supreme Court Cases 235. Secondly it is contended that there was no material before the Labour Court to arrive at the finding that the settlement provided for payment of 36 days wages to the workmen. Merely because some workmen had been paid that amount cannot be the basis for the Labour

Court to direct the company to pay to the workman at that rate. At the highest that can be subject matter of reference. It is therefore, submitted that the order should be set aside.

. On behalf of the Respondent workmen, their learned counsel relies on the judgement of the Apex Court in the case of Ramkrishna Ramanath and the Presiding Officer, Labour Court, Nagpur and another 1970 II LLJ 306 to hold that it was open to the Labour Court in an application under Section 33C(2) to decide an incidental question. In the instant case, there was a settlement. The question was what was payable in terms of the settlement. It is therefore, submitted that the issue was within the jurisdiction being incidental and as such the order cannot be faulted on that count. It is next submitted that considering the provision of Section 92 of the Indian Evidence Act, where the term of settlement is silent, it was open to the respondent workmen to establish the correct meaning of the clause in the settlement. My attention is invited to second proviso to Section 92 of the Indian Evidence Act. Section 92 sets out that if the term of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved in terms of section 91, no evidence of any oral agreement or statement shall be admitted, as

between the parties to any such instrument or their representatives in interest, for the purpose of contradicting varying, adding to, or subtracting from, its terms. Second proviso sets out the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. Reliance for that purpose is placed in the judgement of the Apex Court in the case of Rameshwardas Bansrasidas Vs. M.J.B. Sugar Company, AIR 1926 S.202. It is pointed out that the findings recorded by the learned court that the employee who have subsequently resigned have been paid at the rate of 36 days wages was made on the basis of the evidence led before the court in other matters. It is pointed out that a large number of matters on the same point have been earlier disposed of. It is in these circumstances, that the learned Judge took judicial notice and adverted to that in Paragraph 21 of the judgement. It is therefore, submitted that this will not be a fit case and more so considering the evidence of Mr. More to interfere with the impugned order as otherwise, it is a just order.

5. The first question that has to be decided is whether the application under Section 33C(2) was maintainable. For that purpose we may gainfully reproduce clause (1), (6) and (10) of the

settlement.

"(1) The entire Texmaco Ring Frame Section consisting of 16 Ring Frames shall be closed down permanently. Out of the 45 permanent and 9 temporary employees will be paid gratuity and ex gratia payment. The employees covered under this settlement have individually verified and approved the amount and submitted their resignation to the mill company and the mill company has accepted the said resignation of the employees.

(6) All the permanent employees who have not completed the age of 60 years except for six employees as mentioned in the list below will also receive gratuity and compensation.

1.	Shri.	Damoo	Baloo	2.	Shri.
	Shantaram	Bhawoo	3.	Shri.	Ashok
	Raghunath	4.	Shri.	Dyandeo	Vithoba
	Shri.	Bandoo	Gopal	6.	Shri.
	Santu.				Chaloo

(10). It is further agreed by and between the Rashtriya Mill Mazdoor Sangh and the Phoenix Mills limited that any

worker permanent/substitute in the
 affected department which are blow Room
 Carding Frame or Winding not wanting to
 take alternate employment and requesting
 to be retrenched on the basis of this
 V.R.S. scheme will be paid gratuity plus
 ex-gratia/compensation on the same
 calculation basis used to calculate the
 figure of gratuity plus
 ex-gratia/compensation for permanent and
 substitute employees."

. It is clear from the above that under the
 settlement it has not been specified as to how much
 ex gratia payment would be paid. However, the
 basis used to calculate the figure of gratuity and
 ex-gratia will be the same as paid to permanent and
 substitute employees. It was therefore, open to
 the respondent workmen considering the settlement
 to establish the same i.e. what has been paid to
 permanent and substitute employees by oral evidence
 as that would be incidental issue as to the true
 construction of the terms of the settlement. The
 Judgement in Ganesh (supra) has to be restricted to
 the ratio of that judgement meaning thereby that it
 was not open to Labour Court where the very basis
 of the claim for entitlement is disputed, to
 entertain the application as it would be not
 incidental. It is such claim which is outside the

jurisdiction of the Labour Court. As observed by the Apex Court in Ramkrishna (supra), issues which are incidental to the determination of the question which otherwise there is no dispute about can be gone into by the Labour Court in an Application under Section 33C(2). In the instant case, there is a settlement. The settlement did not set out expressly the entitlement but the basis was set out. Clause (1) cannot be used to defeat the rights of the workmen which they are entitled to under Clause (10) on the ground that there was acceptance of the amount received. That acceptance was much before the settlement. If the amounts paid were less than what the workmen were entitled to under Clause 10, the mere fact that they accepted the amount and approved it, would not estop them in law from claiming the legal dues what the settlement conferred on them. In my opinion therefore, deciding what was payable under Clause (10) would be within the jurisdiction of the Labour Court under Section 33C(2).

6. The real controversy which arises is two fold. The Industrial Court has proceeded to record a finding in favour of the respondent firstly on the ground that considering clause 10 of the settlement the employees who subsequently resigned on account of closure of the Tax Meco Department have been paid ex gratia at the rate of 36 days per year of

service. On perusal of the evidence and on the facts of this case, no such evidence has come from any of the witnesses in this case. It is possible as argued by counsel for Respondent that the Labour Court considering the large number of matters it has considered was considering the same contention where evidence has been led in other matters and merely proceeded on that basis of evidence which has come in other cases. The Labour Court however, could not have so based its findings on evidence which was not available to it though such evidence may have come in other matters before it. To record a finding there must be evidence. In the instant case there was no evidence and as such that finding will have to be set aside. The second aspect of the matter is that where the settlement is silent, the evidence of More who was a signatory to the settlement could have been considered. Mr. More in his evidence which has been reproduced earlier has stated that the workers who were in service prior to 1983 were paid 36 days ex gratia and 15 days gratuity and those who came after May, 1983 were given benefit of 20 days. If that is to be the case, then Clause (1) of the settlement would have to be read to mean that those who were in service prior to 1983 will be paid at the rate of 36 days and those after 1983 at the rate of 20 days. The stand of the company was that though the respondent workmen had joined in the year 1967 as

badli and was thereafter confirmed in the year 1968, none the less his services were terminated and he was employed as a fresh employee. There is no finding of fact on record as to whether the respondent workmen was in continuous service from 1968 and or whether he was in service after 1983 though the workman was paid gratuity for all the years of service. It was treated as continuous service without break. This finding of fact would also be required for the purpose of considering clause (1) and (10) of the settlement. In the absence of such finding, it was not open to the Labour Court to have passed the said order in favour of the respondent workmen. The order on that count also will have to be set aside.

7. It is true that the evidence has come on record that apart from the permanent workman, badli workmen have also been paid ex gratia at the rate of 36 days. It is also contended that in other similar matters, evidence has come on record that workers who were retrenched subsequently have been paid ex-gratia at the rate of 36 days wages in terms of the settlement. It is not necessary for this court to consider this aspect at this stage as it will be still open to the Labour Court to consider that aspect and other material which may come on record. Much can be said about the role of the Union in this matter. It is impossible to

believe that the Union agreed to ad hoc payments depending on the workman for payment of ex-gratia. If the evidence of More has to be accepted, then payment has not been made in terms of Clause (10) based on the years of service. The evidence that has come on record is that payment was not made based on any formula but payment was made and workers asked to acknowledge by signing receipt. Once a settlement has been entered into even after payment of compensation and issue of receipt by the workman, then the Respondent workmen cannot be penalised for the fault of the union in getting a receipt acknowledging payment as full settlement even if it is contrary to the settlement or not leading evidence which has been led in other matters. This will be fit case where this court ought to remand the matter back to the Labour Court to enable the parties to lead fresh evidence, if so advised apart from the evidence that has already come on record and thereafter for the court to pass appropriate orders according to Law. Industrial Law cannot be hedged by the procedural formalities of the Code of Civil Procedure, as long as the dispute is one which is capable of being considered by the Labour Court in the exercise of its jurisdiction under Section 33(C)(2). Considering that long time has been elapsed, application to be disposed of not later than six months from today.

. Rule made absolute accordingly. No order as to costs.

. P.A. to issue authenticated copy of this order.

(F.I. REBELLO,J.)